

**Before the
Federal Communications Commission
Washington, D.C. 20554/**

In the Matter of)	
)	
Amendment of the Commission's)	ET Docket No. 95-183
Rules Regarding the 37.0-38.6 GHz and)	RM-8553
38.6-40.0 GHz Bands)	
)	
Implementation of Section 309(j) of the)	PP Docket No. 93-253
Communications Act -- Competitive)	
Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz)	
Bands)	

**REPLY COMMENTS OF
FIRST AVENUE NETWORKS, INC.**

First Avenue Networks, Inc. (“FAN”) herewith submits its reply comments in the above-captioned proceeding.¹ In its initial comments, FAN demonstrated that there currently exists a chronic excess supply of millimeter wave spectrum and urged the Commission to exercise its regulatory discretion and not adopt licensing and auction rules for the 37/42 GHz spectrum *at this time*. The apparent lack of interest expressed thus far in this proceeding is further evidence supporting this position. Other than FAN’s comments, only two other parties—Winstar Communications, LLC (“Winstar”) and the

The *Notice* proposed the allocation and licensing of spectrum in the 37.0-38.6 and 42.0-42.5 GHz bands (“37/42 GHz bands”) under rules comparable to the existing terrestrial fixed allocation at 38.6-40.0 GHz (“39 GHz band”). Amendment of the Commission's Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, ET Docket No. 95-183, RM-8553; Implementation of Section 309(j) of the Communications Act -- Competitive Bidding, 37.0-38.6 GHz and 38.6-40.0 GHz Bands, PP Docket No. 93-253 (rel. May 5, 2004) (“Notice”); *see also* Amendment of the Commission’s Rules Regarding the 37.0-38.6 GHz and 38.6-40.0 GHz Bands, *Notice of Proposed Rule Making and Order*, 11 FCC Rcd 4930 (1995) (“*First NPRM and Order*”), *Report and Order and Second Notice of Proposed Rule Making*, ET Docket No. 95-183, 12 FCC Rcd 18,600 (1997) (“*R&O and Second NPRM*”), on reconsideration, *Memorandum Opinion and Order*, 14 FCC Rcd 12,428 (1999) (“*MO&O*”).

Fixed Wireless Communications Coalition (“FWCC”)²—commented in response to the *Notice*. Notably, FWCC declined to comment on whether the spectrum should be licensed in the first instance, instead providing feedback on the proposed rule structure presuming that licensing will occur. Winstar, for its part, did not address the need for the spectrum, but did note the existence of “serious issues that require resolution prior to the FCC adopting any licensing scheme.”³ Winstar also noted that “[t]he economic and engineering value in the 37 GHz band remains constrained.”⁴ No parties provided any record evidence in opposition to the economic data filed by FAN that shows that licensing of the 37/42 GHz bands, at this time, would be contrary to the public interest.

Under these circumstances, FAN continues to believe that immediate licensing of the 37/42 GHz band is inadvisable. FAN’s comments included the Declaration of Dr. Simon Wilkie, former Chief Economist of the FCC,⁵ analyzing in detail the current state of the product market relevant to this proceeding, namely the millimeter wave band fixed wireless market. FAN’s comments traced the development of available millimeter frequencies (in the 24 GHz, 26 GHz, 28 GHz, 31 GHz, 38 GHz, and 39 GHz bands) and the fact that the broadband wireless market has not yet robustly developed. As a company with licenses and employing the new leasing model in the millimeter wave market, FAN explained that it has responded to the Commission’s significant regulatory

² Comments of Winstar Communications, LLC, ET Docket 95-183 (filed Dec. 3, 2004) (“Winstar Comments”); Comments of the Fixed Wireless Communications Coalition, ET Docket 95-183 (filed Dec. 3, 2004) (“FWCC Comments”).

³ Winstar Comments at 5.

⁴ *Id.* at 8.

⁵ See Declaration of Simon Wilkie, Comments of First Avenue Networks, Inc., ET Docket 95-183 (filed Dec. 3, 2004 (“FAN Comments”) at Attachment 1 (“*Dr. Wilkie Declaration*”).

efforts to foster innovative and efficient spectrum use that benefits American consumers. FAN believes that this field holds great promise but it is in a nascent stage. Given the oversupply of millimeter wave spectrum and the dearth of other comments filed in this docket, FAN continues to believe that the FCC should defer consideration of further licensing in the millimeter wave bands.

Clearly, no groundswell of interest in obtaining licenses in this band is evident, buttressing FAN's argument that the public would not be fully compensated for this spectrum if an auction were held at this time. No new applications for the band have been brought forth, and a great deal of spectrum already exists—and is readily available for immediate use under secondary markets policies⁶—to support the types of applications the *Notice* identifies for this band.

The licensing and auction of new 37/42 GHz spectrum at a time when the market, technology, and demand have not sufficiently developed could, perversely, undermine the Commission's important spectrum goals in this and other proceedings. The Commission's aim in this proceeding is to “promote seamless deployment of a host of services and technologies in the 37 GHz and 42 GHz bands . . . [and] enhance opportunities for deployment of broadband wireless service, foster effective competition [and] promote innovation.”⁷ The Commission has also been mindful of its policy to “maximize the public interest benefits derived from the use of the radio spectrum.”⁸ These policy goals are echoed in the Commission's other major spectrum initiatives,

⁶ Similar to FAN, Winstar also notes that its 18 GHz, 23 GHz, and 39 GHz spectrum is available for leasing under the secondary markets policies. Winstar Comments at 2.

⁷ Notice at para. 1.

⁸ *Id.* at para. 26.

including the Spectrum Policy Task Force and Secondary Markets proceeding. In pursuit of these goals, the Commission has successfully promoted changes to the spectrum market in recent years through those proceedings. These efforts hold great promise to achieve the Commission's goals and benefit consumers but there has not been enough time for entrepreneurs, service providers and the markets to capitalize on the value of those changes. If the Commission proceeds to license new millimeter spectrum absent any evidence of real market interest, the Commission runs the real risk of sponsoring an undervalued auction subject to competitive manipulation. This result will do little to achieve the Commission's spectrum goals and will only serve to impair the integrity of the Commission's auction process and jeopardize the success of its other spectrum initiatives and the market actors that chose to respond to the Commission's encouragement. Finally, if the Commission proceeds to license and auction this spectrum now and the auction and service languish, the Commission will be faced with expending additional administrative resources and efforts just to revise its rules to accommodate a new service model, use, technology or demand when those eventually develop.

The pace and timing of licensing new spectrum are appropriate regulatory considerations. The *Notice*, in fact, expressly acknowledges that conditions in the past few years have changed and that some of the initial assumptions about the 37/42 GHz band may need to be revisited.⁹ FAN submits that one threshold assumption that should be revisited is the notion that there currently exists real interest in auctioned licenses in this spectrum. Accordingly, FAN continues to urge the Commission to adopt a prudent

⁹ Notice at para. 1.

approach to this spectrum and to defer any licensing and auction of 37/42 GHz spectrum. The Commission should consider revisiting the question of how to make this spectrum available in three years—a period of time during which market conditions could materially change. Indeed, in three years, sufficient demand and technology may have developed to a point that additional millimeter spectrum is needed and likely to be used.

In the event that the FCC inadvisably determines—notwithstanding the weight of evidence to the contrary in the record—that the band should be auctioned, FAN believes that both FWCC and Winstar raise valid points regarding the rule scheme for the new spectrum. FAN concurs, for example, that if the spectrum is placed on the market, the new licenses should be exclusive market area authorizations with partitioning and disaggregation permitted;¹⁰ licensees should be permitted to utilize the band for point-to-point, point-to-multipoint, mobile, or private commons operations;¹¹ if “substantial service” is used as a threshold for renewal expectancy, licensees should explicitly be permitted to take into account common costs in building national or regional networks;¹² secondary satellite usage of the band should be authorized only after development of comprehensive sharing rules and an appropriate power flux density limit;¹³ and, unless necessary for National Security reasons, Federal stations should be protected to the same extent as, and under the same procedures for, non-Federal stations.¹⁴ FAN also reiterates

¹⁰ Winstar Comments at 3, 5; FWCC Comments at 3-4.

¹¹ Winstar Comments at 3-4.

¹² Winstar Comments at 4; FWCC Comments at 4.

¹³ Winstar Comments at 5-6; FWCC Comments at 1-2.

¹⁴ Winstar Comments at 8; FWCC Comments at 3. Indeed, in a prior letter filed in this docket, the National Telecommunications and Information Administration notes, in fact, that “[I]n many or most cases, Federal agencies may actually obtain services in this band from commercial sources.” See Letter from Fredrick R.

the suggestion in its original comments that, should licensing nonetheless proceed in this band, the FCC should attempt to preserve some of the value for the public through minimum bids that reflect actual license value and by limiting the ability of incumbent landline telephone companies to participate.

In conclusion, FAN believes the FCC should defer the allocation and licensing of 37/42 GHz spectrum. Large amounts of millimeter wave spectrum are, and remain, available to interested users at economic rates through secondary markets policies. No potential users have stepped forward to advocate for new spectrum or to suggest that the existing resources are, in any way, insufficient for current applications or uses. And, FAN has previously provided strong economic testimony that an auction conducted at this time would not provide for the public the true value of the 37/42 GHz spectrum asset. On this record, FAN believes the Commission must conclude that deferring licensing is the prudent course.

Respectfully submitted,

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Wentland, Associate Administrator, NTIA Office of Spectrum Management, to Edmond J. Thomas, Chief, FCC Office of Engineering and Technology (Apr. 13, 2004) at 2.